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No. 942 56

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES, PETITIONER

v.

LEIGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above-entitled case on December 13, 1945.

OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of Virginia, Norfolk Division (R. 8–23), is reported in 60 F. Supp. 433. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 25–28) is reported in 152 F. 2d 228.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 13, 1945. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether phosphates owned by the United States and consigned to the British Ministry of War Transport under the Lend-Lease Act, 55 Stat. 31, 22 U. S. C., Supp. IV, 411–419, for use as farm fertilizer in Great Britain, are "military or naval property of the United States moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940, 54 Stat. 898, 954, 49 U. S. C. 65 (a), and are, therefore, entitled to move at land-grant rather than commercial freight rates.

STATUTES INVOLVED

The relevant portions of the Transportation Act of 1940 and the Lend-Lease Act are set forth in the Appendix, *infra*, pp. 14–19.

STATEMENT

The basic facts were stipulated by the parties (R. 1–7). In July 1942, the Seaboard Air Line Railway Company[1] billed the United States for certain freight charges amounting to $733.79 (R. 1). The United States did not question the

[1] Hereinafter referred to as the respondent.

correctness of the charges but deducted from the amount billed the sum of $637.54 and paid respondent the balance of $96.25 (R. 1). Respondent accepted that amount as part payment only and instituted this action in the United States District Court for the Eastern District of Virginia to recover the $637.54 withheld (R. 1). The United States filed its counterclaim for the same amount (R. 1).

The controversy over the amount in suit arose in connection with shipments of 78 cars of phosphate rock and superphosphate over the respondent's railroad in August 1941 on Government bills of lading (R. 1–4). The phosphates so shipped were the property of the United States and were consigned to the British Ministry of War Transport (R. 1–2, 4), a duly authorized representative in the United States of His Majesty's Government in the United Kingdom (R. 4). They were shipped under the Lend-Lease Act, for export to Great Britain and for use there as farm fertilizer (R. 4, 6). Respondent billed the United States for and the United States paid the transportation charges on these shipments at the "commercial rate" (R. 2–3). Thereafter, the General Accounting Office of the United States took exception to these payments, on the ground that the shipments were of military property "subject to land grant deductions," and notified respondent accordingly (R. 2–3). See Section 322 of the Transportation Act of 1940, 54 Stat. 898, 955, 49 U. S. C. 66, Ap-

pendix, *infra*, pp. 15–16. The difference between the "commercial rate" and the "land grant" rate on these shipments amounted to $637.54 (R. 2–3).

The parties also stipulated that the shipments involved were of "defense articles," as defined in Section 2 of the Lend-Lease Act (Appendix, *infra*, p. 16), that when requisition is made by any country, the defense of which the President of the United States deems vital to the defense of the United States, such requisition is considered and scrutinized; that it is accepted, modified, or rejected in accordance with the determination by the President or his representative, such as the Lend-Lease Administrator or the Foreign Economic Administration, as to whether or not shipment of the requisitioned materials will promote the defense of the United States in accordance with the provisions of the Lend-Lease Act; that "In 1941, at the times the requisitions for the materials involved in the counterclaim were made, approved and authorized, and the shipments moved, there was a serious food situation in Great Britain, by virtue of the fact that Great Britain, normally a heavy food importing nation, was cut off from many sources of supply"; that it was necessary for Great Britain to intensify production of food for "direct human consumption" and for this purpose to use phosphate fertilizers; that "the shipments of phosphate rock and superphosphate comprised a part of that program"; and that "Great Britain instituted controls which resulted

in the proper use and distribution of said materials to accomplish this purpose, for which they were requisitioned and authorized under the Lend-Lease Act." (R. 5–6).

The parties further stipulated that if the phosphates "were at the time of their transportation by the Seaboard 'military or naval property of the United States moving for military or naval and not for civil use' within the meaning of Section 321 (a) of the Transportation Act of 1940, Appendix, *infra*, p. 14, the counterclaim asserted by the United States is valid and should be allowed in the amount stated" (R. 4–5).

The district court held that the respondent was entitled to commercial rates, and accordingly entered judgment for respondent for $637.54, and dismissed the counterclaim (R. 8). On appeal to the circuit court of appeals, the judgment of the district court was affirmed (R. 28).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fourth Circuit erred:

1. In holding that the United States was not entitled to land-grant rates on the shipment of phosphates under the Lend-Lease Act for use in Great Britain.

2. In holding that such phosphates, belonging to the United States and exported to Great Britain pursuant to the Lend-Lease Act for use as farm fertilizer in Great Britain, were not "military or naval property of the United

States," within the meaning of Section 321 (a) of the Transportation Act of 1940.

3. In holding that such phosphates, belonging to the United States and shipped on consignment to the British Ministry of War Transport, pursuant to the Lend-Lease Act, for export to Great Britain for use there as farm fertilizer, were not "moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940.

4. In holding that not all "defense articles," within the meaning of the Lend-Lease Act, exported pursuant to the Lend-Lease Act, are "military or naval property of the United States," within the meaning of Section 321 (a) of the Transportation Act of 1940.

5. In holding that not all "defense articles," within the meaning of the Lend-Lease Act, exported under that Act, are "moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940.

6. In affirming the judgment of the district court which had entered judgment for respondent and dismissed petitioner's counterclaim.

REASONS FOR GRANTING THE WRIT

1. Section 3 (a) of the Lend-Lease Act provides that "the President may * * * when he deems it in the interest of national defense", au-

thorize "the Secretary of War, the Secretary of the Navy, or" the head of any government agency to "sell, transfer title to, exchange, lease, lend, or otherwise dispose of" "any defense article" to "the government of any country whose defense the President deems vital to the defense of the United States." Appendix, *infra*, pp. 16–17. "Defense article" is defined in Section 2 (a) as including "any agricultural, industrial, or other commodity or article for defense", in addition to weapons, munitions, aircraft, vessels, and boats, means of making and repairing them, and parts thereof. Appendix, *infra*, p. 16.

Prior to the passage of the Transportation Act of 1940, the United States was entitled to the benefit of reduced rates for all Government property transported over Government-aided (land-grant) mileage. The Transportation Act of 1940 "makes certain concessions to carriers in the rates, fares, and charges applicable to the transportation of persons, property, and mail for the United States" (see *Santa Fe Pac. R. Co.* v. *Ickes*, 57 F. Supp. 984, 986 (D. D. C.)). by providing, *inter alia*, that "notwithstanding any other provision of law * * * the full applicable commercial rates, fares, or charges shall be paid for transportation" of property for the United States. Section 321 (a), Appendix, *infra*, p. 14. That Section provides further, however, that the full commercial rates "shall not apply to the trans-

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portation of military or naval property of the United States moving for military or naval and not for civil use".[2]

The court below noted that "The Transportation Act was passed before the Lend-Lease Act. Sympathies in this country then ran strongly against the Axis powers; it was pretty generally agreed that we should help the enemies of the Axis; there was real fear that the United States might become involved in the conflict; swift measures for defense had to be perfected on an extremely wide scale" (R. 26–27). It recognized that in view of Great Britain's "desperate plight" "at the time of the enactment of the Transportation Act", "the phrase 'military or naval' must be given a very broad meaning" (R. 26) and gave "cheerful assent to Government's assertion that the Lend-Lease Act was enacted as a defense measure, not as a program of humanitarian charity" (R. 26). Despite this verbal recognition of these crucial factors which must have been in the Congressional mind at the time of passage of both

[2] This exception to the requirement that the Government pay the full commercial rates has been repealed by the Act of December 12, 1945, Pub. No. 256, 79th Cong., 1st Sess., Appendix, *infra*, pp. 19–21. The repeal, however, is not effective until October 1, 1946, and therefore does not affect the shipments here involved or any "transportation specifically contracted for prior to such effective date."

the Transportation and Lend-Lease Acts,[3] however, the court below held the impact of the latter on the former to be non-existent, or, at best, negligible.

In so holding, we submit that the court below failed to give full effect to the Lend-Lease Act. Concededly, that Act was passed solely for the purpose of "defense" of the United States and the defense envisaged was a military defense and not a moral one. Any supplies consigned "in the interest of national defense" (See Section 3 (a) of the Lend-Lease Act, Appendix, *infra*, p. 16) must be moved for "military or naval" use, and it would seem to follow that any Government-

[3] That military and other defense measures were foremost in the Congressional mind at the time of passage of the Transportation Act of 1940 is clear, in part from the following chronology of Congressional enactments:

June 28, 1940—An Act To expedite national defense—54 Stat. 676.

July 2, 1940—An Act To expedite the strengthening of the national defense—54 Stat. 712.

September 16, 1940—The Selective Training and Service Act of 1940—54 Stat. 885.

September 16, 1940—An Act To Authorize the Reconstruction Finance Corporation to make loans for the development of deposits of strategic and critical minerals which in the opinion of the Corporation would be of value to the United States in time of war—54 Stat. 897.

September 18, 1940—The Transportation Act of 1940—54 Stat. 898.

owned property so used must, in turn, be military or naval property of the United States.[4]

The court below was in error in holding the land-grant rates inapplicable to the phosphate shipments in question, and its decision, in view of its effect upon the Government's lend-lease freight bill alone, is in direct conflict with the obvious Congressional purpose and policy in enacting Section 321 (a): to enable the Government to conduct its military operations with a minimum of expense. It does not follow that all Government shipments during the war were entitled to reduced rates, or that a reversal of the decision below would amount to reading the words "and not for civil use" out of Section 321 (a) of the Transportation Act of 1940. We do not contend that because World War II was a "total war", shipments of phosphates to be used as fertilizers by American farmers who produced food for the American civilian population would fall within the exception in the 1940 Act. Cf. R. 6. Such shipments might well move, in part, because of military considerations; but the purpose of the movement would generally be dual; it would be a movement of goods also motivated by the ever-present necessity of feeding the American people.

[4] Foodstuffs and phosphates were included in the list of items covered by Executive Proclamation under the Export Control Act, 54 Stat. 712, which, in terms, applies to "military equipment or munitions * * * or supplies necessary for the manufacture thereof * * *." See 6 F. R. 1300, 1301, 1540, 3584, and 3591.

By way of contrast, we think it plain that lend-lease goods "moved" for one purpose and one purpose alone. Cf. *Southern Pacific Co.* v. *United States*, 285 U. S. 240, 245.[5] As President Roosevelt said (Seventeenth Report to Congress on Lend-Lease Operations, pp. 7, 8):

> The lend-lease system is * * * a system of combined war supply, whose *sole purpose* is to make the most effective use against the enemy of the combined resources of the United Nations, regardless of the origin of the supplies or which of us uses them against the enemy.
>
> * * * * *
>
> Lend-lease and reverse lend-lease are a system of combined war supply. They should end with the war. [Italics supplied.]

This single purpose of lend-lease movements and the all but simultaneous termination of such movements[6] and of the land-grant rates serve, we suggest, to make manifest the error in the decision below, a decision which ascribes "civil" character to the movement of "defense articles", shipped in time of war under the Lend-Lease Act—"An Act to Promote the Defense of the United States"—to Great Britain, a "country whose defense the

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[5] Under Section 321 (a) of the Transportation Act (Appendix, *infra*, p. 14), the crucial test is the use for which Government-owned goods are "moving."

[6] See President Truman's Letter of Transmittal of August 30, 1945, Twentieth Report to Congress on Lend-Lease Operations, p. 5. See also Pub. No. 31, 79th Cong., 1st Sess., approved April 16, 1945, extending the life of the Lend-Lease Act until June 30, 1946. See *supra*, note 2, p. 8.

President deems vital to the defense of the United States." See enacting clause and Section 3 (a) (1) of the Lend-Lease Act, Appendix, *infra*, pp. 16–17.

2. Authoritative decision by this Court of the question here presented is of great importance to the Government. If the decision below was correct, the phosphates whose shipment is here in issue and innumerable other "defense articles", within the meaning of the Lend-Lease Act, shipped for export under that Act, could move only at the regular commercial freight rates, a result not lightly to be attributed to Congress, confronted with the problem of financing a vast military program. If, however, the decision below is, as we believe, erroneous, then the phosphates were entitled to move at the lower land-grant rates. While the difference between the applicable commercial rates and the land-grant rates amounts, in the instant case, to only $637.54, the financial importance of the question presented must be considered in terms of the effect of the decision below upon the freight bills to be paid by the Government for the carriage of hundred of millions, and perhaps billions, of dollars worth of "defense articles" shipped by the Government

under the Lend-Lease Act.[1] Petitioner has been advised by the Office of Foreign Liquidation Commissioner in the United States Department of State, the successor to the lend-lease functions of the Foreign Economic Administration, that if the decision below is correct "the cost of the lend-lease program would be increased by many millions of dollars, probably several hundred million dollars". See also 91 Cong. Rec. (daily ed., October 2, 1945) 9388; 91 Cong. Rec. (daily ed., November 30, 1945) 11448; H. Rep. No. 393, 79th Cong., 1st Sess., pp. 8–9; S. Rep. No. 552, 79th Cong., 1st Sess., pp. 9–10.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

J. HOWARD MCGRATH,
Solicitor General.

MARCH 1946.

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[1] It is worthy of note that of the $40,196,677,000 worth of goods transferred to foreign governments under the lend-lease program from March 1941 to October 1, 1945, only slightly more than half consisted of munitions. Twenty-first Report to Congress on Lend-Lease Operations, p. 37. It is submitted that the decision below leaves in doubt the freight rates to be paid by the Government upon the shipment, under the lend-lease program, of all goods transferred to foreign governments, with the exception of actual munitions.

APPENDIX

The Transportation Act of 1940, 54 Stat. 898, 49 U. S. C. 65 (a), *et seq.*, provides, in part, as follows:

PART II—RATES ON GOVERNMENT TRAFFIC

Government to Pay Full Rates

SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; * * *.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner pre-

scribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior, to the extent that the issuance of such patents may be authorized by law.

Deduction of Overpayments

SEC. 322. Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government

to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

The Lend-Lease Act (Act of March 11, 1941), 55 Stat. 31, 22 U. S. C., 411–419, provides, in part, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "An Act to Promote the Defense of the United States".

SEC. 2. As used in this Act—

(a) The term "defense article" means—

(1) Any weapon, munition, aircraft, vessel, or boat;

(2) Any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation of any article described in this subsection;

(3) Any component material or part of or equipment for any article described in this subsection;

(4) Any agricultural, industrial or other commodity or article for defense.

Such term "defense article" includes any article described in this subsection: Manufactured or procured pursuant to section 3, or to which the United States or any foreign government has or hereafter acquires title, possession, or control.

(b) The term "defense information" means any plan, specification, design, prototype, or information pertaining to any defense article.

SEC. 3. (a) Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the interest of national defense, authorize the

Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government—

(1) To manufacture in arsenals, factories, and shipyards under their jurisdiction, or otherwise procure, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for the government of any country whose defense the President deems vital to the defense of the United States.

(2) To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government any defense article, but no defense article not manufactured or procured under paragraph (1) shall in any way be disposed of under this paragraph, except after consultation with the Chief of Staff of the Army or the Chief of Naval Operations of the Navy, or both. The value of defense articles disposed of in any way under authority of this paragraph, and procured from funds heretofore appropriated, shall not exceed $1,300,000,000. The value of such defense articles shall be determined by the head of the department or agency concerned or such other department, agency or officer as shall be designated in the manner provided in the rules and regulations issued hereunder. Defense articles procured from funds hereafter appropriated to any department or agency of the Government, other than from funds authorized to be appropriated under this Act, shall not be disposed of in any way under authority of this paragraph except to the extent hereafter authorized by the Congress in the Acts appropriating such funds or otherwise.

(3) To test, inspect, prove, repair, outfit, recondition, or otherwise to place in good

working order, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for any such government, or to procure any or all such services by private contract.

(4) To communicate to any such government any defense information, pertaining to any defense article furnished to such government under paragraph (2) of this subsection.

(5) To release for export any defense article disposed of in any way under this subsection to any such government.

(b) The terms and conditions upon which any such foreign government receives any aid authorized under subsection (a) shall be those which the President deems satisfactory, and the benefit to the United States may be payment or repayment in kind or property, or any other direct or indirect benefit which the President deems satisfactory.

(c) After June 30, 1943, or after the passage of a concurrent resolution by the two Houses before June 30, 1943, which declares that the powers conferred by or pursuant to subsection (a) are no longer necessary to promote the defense of the United States, neither the President nor the head of any department or agency shall exercise any of the powers conferred by or pursuant to subsection (a); except that until July 1, 1946, any of such powers may be exercised to the extent necessary to carry out a contract or agreement with such a foreign government made before July 1, 1943, or before the passage of such concurrent resolution, whichever is the earlier.

(d) Nothing in this Act shall be construed to authorize or to permit the author-

ization of convoying vessels by naval vessels of the United States.

(e) Nothing in this Act shall be construed to authorize or to permit the authorization of the entry of any American vessel into a combat area in violation of section 3 of the Neutrality Act of 1939.

* * * * *

SEC. 8. The Secretaries of War and of the Navy are hereby authorized to purchase or otherwise acquire arms, ammunition, and implements of war produced within the jurisdiction of any country to which section 3 is applicable, whenever the President deems such purchase or acquisition to be necessary in the interests of the defense of the United States.

SEC. 9. The President may, from time to time, promulgate such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act; and he may exercise any power or authority conferred on him by this Act through such department, agency, or officer as he shall direct.

SEC. 10. Nothing in this Act shall be construed to change existing law relating to the use of the land and naval forces of the United States, except insofar as such use relates to the manufacture, procurement, and repair of defense articles, the communication of information and other noncombatant purposes enumerated in this Act.

Public Law 256, 79th Cong., 1st Sess., December 12, 1945, provides:

* * * That subsection (a) of section 321 of title III, part II, of the Transportation Act of 1940, be, and the same is hereby, amended by striking out the following: "ex-

cept that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or property of such members) when such members are traveling on official duty;" so that said subsection, as so amended, shall read as follows:

"SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of section 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That section 3709, Revised Statutes (U. S. C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed."

SEC. 2. The amendment made by section 1 of this Act shall take effect October 1, 1946: *Provided, however,* That any travel or transportation specifically contracted for prior to such effective date shall be paid

for at the rate, fare or charge in effect at the time of entering into such contract of carriage or shipment.

SEC. 3. The Interstate Commerce Commission, in the exercise of its power to prescribe just and reasonable rates, fares, and charges, shall give due consideration to the increased revenues which carriers will receive as a result of the enactment of this Act, so that such increased revenues will be reflected in appropriate readjustments in rates, fares, and charges to shippers.

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